82-1802

No.....

In The

Supreme Court of the United States

October Term, 1982

IN THE MATTER OF ORVILLE E. HANSEN,

Debtor.

FIRST NATIONAL BANK OF TEKAMAH, NEBRASKA,

Petitioner,

vs.

ORVILLE E. HANSEN and VIRGINIA HANSEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. What effect did the expiration of the stay granted in *Northern Pipeline Co. v. Marathon Pipe Line*, — U. S. —, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) have on this adversary proceeding which had been originally commenced and tried to judgment in the Bankruptcy Court and, which, three days before the stay expired, had been remanded from the District Court to the Bankruptcy Court for further trial?

2. Did the Circuit Court err in finding that *Northern Pipeline Co. v. Marathon Pipe Line* invalidated only that portion of § 241 (a) of the Bankruptcy Act of 1978 which granted original jurisdiction to the bankrutpcy courts [28 U. S. C. § 1471 (c)] and that, therefore, after *Marathon* became effective, original jurisdiction of this adversary proceeding vested in the District Court under the remaining portion of § 241 (a) [28 U. S. C. § 1471 (a) and (b)]?

3. Did the Circuit Court err in finding that, alternatively, if *Marathon* did invalidate the whole of § 241(a), the District Court nevertheless has original jurisdiction of this adversary proceeding under 28 U. S. C. § 1334?

4. Is Petitioner's constitutional right to due process violated by the Order of the District Court wherein the District Court, after having exercised appellate jurisdiction over this adversary proceeding, now asserts original jurisdiction over the case, remands the case to itself, and proceeds to act as the trial court in this matter?

5. Did the Circuit Court err in holding that the Emergency Rule adopted on December 25, 1982 by the

United States District Court for the District of Nebraska (Local Rule 51) is valid and constitutional and that the District Court can properly refer this case to the Bankruptcy Court under that Rule for further trial?

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OPINIONS BELOW

The Appendix to this brief sets forth the following Judgments, Opinions and Orders of the Courts below: (A) Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit entered March 23, 1983, *In re Orville Hansen,* 10 B. C. D. 280 (8th Cir. 1983); (B) Order of the United States District Court entered February 10, 1983; (C) Order and Memorandum Opinion of the United

States District Court entered December 21, 1982; and (D) Judgment of the United States Bankruptcy Court entered July 22, 1982.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit was entered on March 23, 1983. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND COURT RULES INVOLVED

Appendix E—§ 241 (a) of P. L. 95-598 [28 U. S. C. § 1471, only]

Appendix F—28 U. S. C. § 1334

Appendix G—§ 238 of P. L. 95-598

Appendix H—§ 402 of P. L. 95-598

Appendix I—§ 405 of P. L. 95-598

Appendix J—Rule 51 of the Local Rules of the United States District Court for the District of Nebraska

Appendix K—11 U. S. C. § 105

Appendix L—28 U. S. C. § 2071

Appendix M—Rule 83, Federal Rules of Civil Procedure

Appendix N—Rule 927, Federal Rules of Bankruptcy Procedure

Appendix O—United States Constitution, Amendment V

STATEMENT OF THE CASE

On October 6, 1981, Orville Hansen, a Nebraska farmer, filed a voluntary Petition for Chapter 11 Reorganization in the United States Bankruptcy Court for the District of Nebraska. Virginia Hansen, the Debtor's wife, did not file any Petition in bankruptcy.

The Debtor's Petition listed Petitioner First National Bank of Tekamah, Nebraska[1] as a secured creditor and scheduled 100 percent (100%) of the debts owing to Petitioner as liabilities of the Debtor; however, the Debtor's schedule of assets included only one-half of the value of those assets which Mr. Hansen had granted to Petitioner as security for his loans and which he had warranted in the Security Agreement were and would be owned by him alone.

At the time of filing his Petition, Mr. Hansen advised Petitioner for the *first* time in his thirty-year lending relationship, that Mrs. Hansen owned one-half of all of the secured collateral as a co-tenant with him and that her half of the collateral was not an asset of his bankruptcy estate or subject to Petitioner's lien because she was not

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[1]The parent company of First National Bank of Tekamah, Nebraska is Tekamah Agency Company. Affiliates of that company are: Arcadia Agency Company, Brainard Agency Company, Decatur Agency Company, First Nat'l Stanton Corp., Ida Holding Company, Inc., Malmo Agency Company, Emerson First Nat'l Co., Wagner Mills, Inc., Tiger Tom Assoc., Ltd., Farm Products Elev., Inc., The Farmers Company, F.C.S., Inc., Bone Creek Farms [all of Schuyler, Nebraska], First National Agency Co. [Stanton, Nebraska], Valley Agency Company [Valley Nebraska], Fremont Inns, Inc. [Fremont, Nebraska], First State Bank of Dwight [Dwight, Nebraska], Sunbank of South Dakota [Sioux Falls, South Dakota].

his business partner and she had not signed the Security Agreement.

On November 20, 1981, Petitioner commenced this adversary proceeding against the Debtor and his wife in the United States Bankruptcy Court for the District of Nebraska. That Court acquired original jurisdiction of this proceeding under § 405 (b) of the Bankruptcy Act of 1978 which provides that during the transition period, the amendment made by section 241 of the Act (28 U. S. C. § 1471) shall apply to the courts of bankruptcy continued by section 404 (a) of the Act.

The Complaint, as subsequently amended, alleged six causes of action: The first sought a declaratory judgment adjudicating under Nebraska law the respective ownership rights of the Hansens in the secured collateral and the rights and interests of Petitioner therein; the remaining five causes of action, all of which were contingent upon a finding on the first cause that Mrs. Hansen did co-own the collateral free of Petitioner's security interest, sought (1) a judgment for compensatory damages against the Debtor due to his common law fraud in misrepresenting his sole ownership of the collateral; (2) a judgment pursuant to 11 U. S. C. § 1141 and 11 U. S. C. § 523 (a) (2) denying the Debtor a discharge of the debts he owes to Petitioner; (3) a judgment against both Defendants for compensatory damages due to their conversion of moneys loaned to the Debtor for the express purpose of enabling him to purchase and own collateral that would be fully secured by Petitioner's lien; (4) a judgment against Mrs. Hansen estopping her from asserting against Petitioner any ownership interest she may have in the collateral; and (5) a

judgment against Mrs. Hansen for compensatory damages due to her unjust enrichment.[2]

While the case was pending in the Bankruptcy Court and prior to trial, this Court on June 28, 1982 handed down its judgment in *Northern Pipeline Construction Co. v. Marathon Pipe Line,* — U.S. —, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982). The judgment was stayed until October 4, 1982 and that stay was extended to December 24, 1982.

While the stay was in effect, the case was tried in the Bankruptcy Court on July 20 and 21, 1982. At the close of Petitioner's evidence, the Bankruptcy Court granted the Defendants' Motion to dismiss the Complaint in its entirety. On July 22, 1982, the Bankruptcy Court entered its Judgment (Appendix D) finding that the secured collateral was co-owned by the Defendants and that Petitioner had a security interest only in Mr. Hansen's half (except as to growing crops which the Court found were totally unsecured). The Judgment then dismissed each and every other cause of action.

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[2]After the Chapter 11 Petition was filed, the collateral was liquidated and, by agreement of the parties approved by the Bankruptcy Court, the proceeds were deposited into an escrow account held by Petitioner subject to an Order of the Bankruptcy Court that Petitioner "shall not set off or otherwise attempt to obtain possession of the escrowed funds pending final resolution of the dispute between the Bank, Debtor and Debtor's wife or an agreement between the parties." The Bankruptcy Court, after trial and while appeal was pending in the District Court, ordered release of the portion of the escrowed funds which it had ruled were not subject to Petitioner's security interest. The Order was stayed by the District Court and the Circuit Court during the subsequent appeals. On April 27, 1983 a further stay was granted by a Justice of this Court.

On July 28, 1982, Petitioner filed a timely appeal of that Judgment to the District Court. The District Court acquired jurisdiction of the appeal by virtue of § 405 (c) (2) of the Bankruptcy Act of 1978 which gives the District Court during the transition period the same jurisdiction as is granted under § 238 of the Act, amending 28 U. S. C. § 1334.

On December 21, 1982, the District Court entered an Order and Memorandum Opinion (Appendix C) affirming the Judgment of the Bankruptcy Court in part and remanding the case to the Bankruptcy Court for specific findings and for the taking of such further evidence as it deems necessary to the determination of an unresolved issue of whether Mrs. Hansen authorized or ratified her husband's use of her half of the property as security for his loans.

On December 23, 1982, in anticipation of the expiration of the *Marathon* stay, the Judges of the United States District Court for the District of Nebraska entered an Order amending the Local Rules of that Court to add Local Rule 51 effective December 25, 1982 (Appendix J). Under Local Rule 51 "all cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district" subject to withdrawal at any time by the District Court on its own motion or on timely motion by a party.

On January 3, 1983, pursuant to Rule 812 of the Rules of Bankruptcy Procedure, Petitioner filed a timely Motion for Rehearing, pointing out various errors of law made by the District Court in its rulings on the

merits. In addition, Petitioner requested that the District Court vacate the remand to the Bankruptcy Court and decide the remaining issue itself, as an appellate court, for the reasons that (1) original jurisdiction of this case no longer existed since the trial court, i. e., the Bankruptcy Court, no longer had a valid grant of original jurisdiction; (2) the District Court, as appellate court, is prohibited by its own jurisdictional statute [28 U. S. C. § 1334 (c)] from using the Bankruptcy Court as a special master to take evidence and make findings; and (3) Local Rule 51, which purports to enable the Bankruptcy Court to accept the reference of this matter is unconstitutional and invalid.

On January 20, 1983, the Rehearing Motion not having been granted,[3] Petitioner filed a Notice of Appeal with the United States Court of Appeals for the Eighth Circuit invoking that Court's appellate jurisdiction under 28 U. S. C. § 405 (c) (2) of the Bankruptcy Act of 1978, which gives the Circuit Court the same appellate jurisdiction during the transition period as that created by § 236 of the Act [28 U. S. C. § 1293 (b) added effective April 1, 1984].

On February 3, 1983, the Defendants-Appellees moved to dismiss the appeal on the grounds that the Order of December 21, 1982, was interlocutory because, after *Marathon,* original jurisdiction of this case vested in the District Court, making the Order an effective remand which

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[3]A Motion for Rehearing filed under Bankruptcy Rule 812 does not suspend the running of the time for appealing a final order or judgment of the district court. See Advisory Committee's Note to Federal Rule of Bankruptcy Procedure 812; and 9 Moore, *Federal Practice,* ¶ 204.12[6], pgs. 4-86 to 4-88 (1982 ed.)

transferred jurisdiction of this case from the District Court, as appellate court, to the District Court, as trial court. Hence, Appellees argued, under new Local Rule 51, the matter can be properly referred to the Bankruptcy Court for further trial. Petitioner resisted the Motion asserting that the Order of December 21, 1982 was "final" for the reason that original jurisdiction of this case no longer exists in *either* the Bankruptcy Court or the District Court after *Marathon* and, therefore, the portion of that Order which directed a remand was ineffectual as such and constituted a dismissal which was final and appealable. See *Amalgamated Workers Union of V.I. v. Hess Oil Corp.*, 478 F. 2d 540, 542, n. 1 (3rd Cir. 1973). Petitioner further argued that even if the District Court had original jurisdiction, Petitioner's constitutional right to due process would be violated if the *same* court acted as both appellate court and trial court in the same proceeding, as the District Court intended to do.

On February 10, 1983, the District Court entered an Order (Appendix B) modifying its Order of December 21, 1982 so that the remand transfers the case from the District Court as appellate court, to the District Court as the court "of original jurisdiction" for "trial *de novo* of the sole factual issue remaining in this case" (the wife's authorization or ratification of her husband's use of her property as security for his debts). In the same Order, the District Court "acting in the capacity of a district court with original jurisdiction of 'related proceedings' within the meaning of *Local Rule* 51, . . . accepts jurisdiction and simultaneously refers the trial of said issue to the United States Bankruptcy Court for the District of Nebraska for further proceedings in accordance with this Order, the

Memorandum and Order of December 21, 1982 and *Local Rule* 51." The Eighth Circuit treated both the Order of December 21, 1982 and the modifying Order of February 10, 1983 as the subject of the appeal.

On March 23, 1983, after oral argument, the Eighth Circuit dismissed the appeal [Appendix A], finding that the Order appealed from was interlocutory because, after *Marathon,* the District Court has original jurisdiction of this adversary proceeding under either 28 U. S. C. § 1471 (a) and (b) or 28 U. S. C. § 1334 and holding further that the Local Rule under which reference of this case is made from the District Court, as the "court of original jurisdiction" to the Bankruptcy Court for further trial, is valid and constitutional.

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REASONS FOR GRANTING THE WRIT

I. The Circuit Court's decision is in direct conflict with an applicable decision of this Court.

The Bankruptcy Act of 1978 repealed the former Bankruptcy Act of 1898 effective October 1, 1979. The repeal abolished all of the sections of the former Act which had granted original subject matter jurisdiction to the district courts [11 U. S. C. § 11 (a) (20), 11 U. S. C. § 46 and 11 U. S. C. § 66]. Section 241 (a) of the new Act established a new grant of subject matter jurisdiction by adding 28 U. S. C. § 1471 to the United States Code. Section 405 (b) of the new Act made the amendments provided by Section 241 (a) applicable during the transition period to "the courts of bankruptcy continued by Section

404 (a)" of the Act. These "continued courts of bankruptcy," as defined under section 1 (10) of the former Bankruptcy Act, include both the bankruptcy courts and the district courts.

The jurisdictional grant contained in § 241 (a) [28 U. S. C. § 1471] purported to vest jurisdiction at two levels. Subsections (a) and (b) of § 1471 vested district courts with original jurisdiction of all "cases under title 11" and "of all civil proceedings arising under title 11 or arising in or related to cases under title 11." Subsection (c) of § 1471, however, prohibited the district courts from exercising any of that jurisdiction by providing that the bankruptcy courts "shall exercise all of the jurisdiction conferred by this section on the district courts." The role assigned to the district courts under the new Act was that of appellate review. See Section 238 of the new Act amending 28 U. S. C. § 1334 to change the jurisdiction granted by that statute to district courts from original jurisdicion to appellate jurisdiction. And see S. REP. No. 989, 95th Cong., 2d Sess. at 154 (1978), stating:

> [T]he district judge will function *only* as an appellate judge in bankruptcy matters. . . . (emphasis added).

In *Northern Pipeline Co. v. Marathon Pipe Line*, — U. S. —, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982), this Court construed the jurisdictional grant made by § 241 (a). Six of the Justices of this Court found that this statute made a "single" grant of jurisdiction to a "single" court, the bankruptcy court. These Justices further found that this single statutory grant of jurisdiction to the bankruptcy court, although invalid only in part, was not sever-

able, thus requiring invalidation of the statute in its entirety.

The Eighth Circuit's Opinion and Judgment is in direct conflict with this Court's judgment in *Marathon*. The Circuit Court has misconceived *Marathon* to mean that § 241 (a) effectively vested subject matter jurisdiction in *both* district courts and bankruptcy courts and that only that portion of § 241 (a) which granted original jurisdiction to the bankruptcy courts [28 U. S. C. § 1471 (c)] was invalidated, thus leaving in effect the remainder of the statute which purported to vest jurisdiction in the district courts. In so holding, the Circuit Court has ignored the construction which six of the Justices of this Court placed on that portion of § 1471 which *supposedly* vested original jurisdiction in the district courts, but which, it was held, in reality, did not.

The construction placed on § 1471 (a) and (b) begins in the plurality opinion which notes that "the relationship between the district court and the bankruptcy court was changed under the 1978 Act" so that bankruptcy courts are "no longer 'subordinate adjuncts of the district court'" but are "'independent of the United States district court,'" 73 L. Ed. 2d at 621, n. 31. That district courts were no longer intended to serve as courts of original jurisdiction in bankruptcy with the ability to control cases and proceedings at the trial level, was made plain by the elimination under the 1978 Act of their discretionary power to refer matters "at the trial stage" to the bankruptcy referee for decision and to withdraw the reference at any time, 73 L. Ed. 2d at 621, n. 31. Under the new Act, the Bankruptcy Court was permitted to "exercise 'all of the

jurisdiction' conferred by the Act on the district courts" and to "exercise all ordinary powers of district courts" by, among other things, entering enforceable judgments which are "subject to review only under the more deferential 'clearly erroneous' standard," 73 L. Ed. 2d at 624.

Thus, the plurality found that the intent of this statutory scheme was to make the bankruptcy court the "ultimate repository" of *all* of the original jurisdiction created by the statute, 73 L. Ed. 2d at 604, n. 3, and to confer on it powers "far greater" than those that could be permissibly exercised by a non-Article III adjunct, 73 L. Ed. 2d at 625.

The mechanism of the dual level vesting of jurisdiction used by Congress to effectuate this purpose was construed to be what it actually was, a "facade" which, in reality, granted no jurisdiction whatsoever to the district courts, 73 L. Ed. 2d at 625. The mechanism used, in fact, "*removed* most, if not all, of the essential attributes of the judicial power from the Art III district court" and "vested those attributes in a non-Art III adjunct," 73 L. Ed. at 625 (emphasis added). Thus, the plurality found that by § 1471

> Congress has vested jurisdiction of this and all matters related to cases under title 11 in a *single* non-Art III Court, and has done so pursuant to a *single statutory* grant of jurisdiction. 73 L. Ed. 2d at 625, n. 40 (emphasis added).

Accordingly, having found that only a "single" court received jurisdiction from this statute and having found that that court lacked Art III powers, the plurality held that "[s]uch a grant of jurisdiction cannot be sustained as an

exercise of Congress' power to create adjuncts to Art III courts," 73 L. Ed. 2d at 625.

The concurring opinion agrees with the view that § 241 (a) vests original jurisdiction solely in the bankruptcy court, stating that under this statutory scheme "[a]ll matters of fact and law in whatever domains of the law to which the parties' disputes may lead *are to be resolved by the Bankruptcy Court in the first instance,* with only traditional appellate review apparently contemplated by Art III courts," 73 L. Ed. 2d at 628 (emphasis added).

Thus, six Justices of this Court recognized that Section 241 (a) made only a *single* grant of original jurisdiction to a *single* court, the Bankruptcy Court.

Having so found, both the plurality and the concurring opinions agreed that the *sole* grant of jurisdiction made by the statute (i. e., the "single" grant to the "single" court, the bankruptcy court), although invalid only in part, was not readily severable, 73 L. Ed. 2d at 625-626, n. 40 and 628. Accordingly, the six Justices held that the statute must be struck down in its entirety and that the *Marathon* case must be dismissed from the federal judicial system.

In light of the fact that six Justices found that the statute was not intended to and did not confer exercisable district court original jurisdiction, the plurality expressly rejected the suggestion that the case be "routed to the United States District Court" for trial, 73 L. Ed. 2d at 626, n. 40. The plurality recognized that this suggestion of permitting the district court to exercise the jurisdiction granted by § 1471(a) and (b) would not comply with or effectuate the legislative purpose, stating that "it is for

Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art III, *in the way that will best effectuate the legislative purpose*," 73 L. Ed. 2d at 626, n. 40 (emphasis added).[4]

Both the concurring and the plurality opinions further agreed that the *Marathon* holding, once effective, would impair the administration of the bankruptcy laws and leave no valid means of adjudication of bankruptcy matters. Hence, the six Justices agreed to stay their judgment for a specified period of time "to afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication," 73 L. Ed. 2d at 626 and 628.

That the whole of § 241(a) was invalidated is further evidenced by the dissenting opinion written by Justice White and joined in by Justices Burger and Powell which speaks of the "sweeping invalidation of § 241(a)," 73 L. Ed. 2d at 631, n. 3. Clearly, taking all of the opinions together, it is indisputable that *all* of the Justices of this Court agreed that the holding of *Marathon* invalidated the jurisdictional statute in its entirety.

Notwithstanding the total invalidation of § 241(a), the Eighth Circuit has ruled that *Marathon* severed and

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[4]In so finding the plurality maintained the rule enunciated many times by the Court in the past, that severance is impermissible where Congress did not intend one provision of a statute to stand, if another should fall. See, e. g., *Muskrat v. United States*, 219 U. S. 346, 363, 31 S. Ct. 250, 55 L. ed. 246, 252 (1911) (where appellate jurisdiction of a particular kind of claim conferred on Supreme Court was unconstitutional, original jurisdiction of such claims conferred on the court of claims must also fall since Congress intended the two grants to stand together).

saved that portion of the statute which purported to grant original jurisdiction to district courts. This ruling is in direct conflict with the *Marathon* decision. We, therefore, respectfully submit that this Petition should be granted to effectuate the *Marathon* holding and to prevent the lower courts from continuing to exercise original jurisdiction over this adversary proceeding in the absence of a valid grant of jurisdictional authority. The Court should grant the Petition and instruct the lower courts to dismiss this proceeding without prejudice to Petitioner's right to seek a further adjudication of its state law claims in the courts of the State of Nebraska. Cf. *Schaller v. Bd. of Supervisors,* 83 F. 2d 1016 (8th Cir. 1936).

II. The Court should settle the important federal question of whether, after the enactment of the Bankruptcy Act of 1978, district courts retained original jurisdiction over matters and proceedings in bankruptcy under 28 U. S. C. § 1334 and, if so, whether the jurisdiction granted by that statute is sufficient to authorize the continued trial of this adversary proceeding.

Prior to October 1, 1979, 28 U. S. C. § 1334 [Appendix F] provided district courts with "original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy." The jurisdiction granted by this statute was "summary jurisdiction" only, 13 Wright and Miller, *Federal Practice and Procedure,* § 3570 (1975 ed.) and was intended to complement the broader jurisdiction granted to the district courts by the Bankruptcy Act of 1898. See *In re James Conley and Laura Conley,* 10 B. C. D. 10, 14-16, 26 B. R. 885, 894-896 (Bk. Ct. M. D. Tenn. 1983).

Section 238 of the Bankruptcy Act of 1978 [Appendix G] amended § 1334 to eliminate the grant of original jurisdiction and to provide for a grant of appellate jurisdiction to the district courts. This amendment was an effectuation of the Congressional purpose of allowing the Bankruptcy Court to exercise "all" of the district court's original jurisdiction and of the intent to confine the role of the district court to appellate review only. See S. REP. No. 989, supra, at 154.

The amended version of § 1334 became effective on October 1, 1979. Section 402(a) of the new Act provides that "Except as otherwise provided in this title [Title IV —Transition] this Act shall take effect on October 1, 1979." The effective date of new 28 U. S. C. § 1334 is "otherwise provided" in § 405(c) (2) which states "During the transition period [beginning October 1, 1979], the jurisdiction of the district courts . . . to hear appeals shall be the same as the jurisdiction of such courts . . . granted under the amendments made by Section . . . 238. . . ." Thus, the effective date of new 28 U. S. C. § 1334 is the beginning of the transition period, October 1, 1979 and the grant of original jurisdiction in old § 1334 expired at that time. See *In re International Horizons, Inc.*, 689 F. 2d 996, 1000, n. 5 (11th Cir. 1982) ["Section 405(c) (2) of the Bankruptcy Reform Act provides that 28 U. S. C. § 1334 is now in effect."]; *In re Dorothy J. Williamson*, 10 B. C. D. 298, 303-304 (Bk. Ct. M. D. Ga. 1983) [holding that old § 1334 ceased to be operative on 10/1/79]; *In re James C. Conley & Laura Conley*, 10 B. C. D. 10, 15, 26 B. R. 885, 896 (Bk. Ct. M. D. Tenn. 1983) [holding that old § 1334 was repealed by implication on 10/1/79 because its continued existence would be in direct conflict with Section 405(b)

which expresses Congress' intent that *only* the bankruptcy courts shall exercise original jurisdiction during the transition period], and *In re Macon Uplands Venture,* 2 B. R. 435, 441 (Bk. Ct. D. Md. 1979) [holding that under the 1978 Act original jurisdiction is vested "exclusively" in the bankruptcy court and district courts can exercise only appellate jurisdiction over cases filed under the new Act and then only if that procedure has been adopted by the Circuit Court of which the district court is a part].

Marathon found that the new Bankruptcy Act significantly changed the relationship between the district courts and the bankruptcy courts, making the latter the sole recipient of original jurisdiction with the power to enter enforceable judgments subject only to appellate review.

In so finding, the Court did not expressly address the issue of whether Congress intended district courts, during the transition period, to continue to retain and exercise the original jurisdiction granted to them by old 28 U. S. C. § 1334; however, it is apparent that Congress did not so intend since such a purpose would be in direct conflict with the intent expressed in § 405(a)(1) ("All cases commenced under Title 11 of the United States Code during the transition period *shall be* referred to the United States bankruptcy judges") and with § 405(b) which, by making § 241 (a) applicable during the transition period, expresses an intent that only the bankruptcy courts would exercise original jurisdiction during that period.

This important federal question should be settled by this Court, and particularly in this case, since in the instant case the District Court has already exercised the appellate jurisdiction granted to it by the *amended* version of § 1334 and the Circuit Court has ruled that the

District Court may now exercise original jurisdiction in the *same* case under the unamended version of the *same* statute.

The Circuit Court's opinion would make both the amended and the unamended versions of § 1334 operable at the same time. This holding must be erroneous, particularly in view of the legislative history of the new Act which states "the district judge will function *only* as an appellate judge in bankruptcy matters," S. REP. No. 989, supra (emphasis added). Moreover, the claims over which the District Court would be asserting original jurisdiction include state law claims for monetary damages against a non-bankrupt party, Mrs. Hansen, which require *plenary* jurisdiction not granted by § 1334. *In re Otero Mills, Inc.*, 10 B. C. D. 89, 90 (Bk. Ct. N. D. Mex. 1983).

III. The Court should exercise its supervisory powers over the lower courts to prevent their continued and unauthorized exercise of original jurisdiction over this adversary proceeding and to eliminate the current state of confusion and conflict in the lower courts.

On the day the *Marathon* stay expired, the United States District Court for the District of Nebraska, like all of its sister courts, adopted a new local rule [Local Rule 51, Appendix J] purporting to make a reference to the Bankruptcy Court of all cases under title 11 and of all civil proceedings arising in or related to cases under title 11. The Rule was drafted by the Ninth Circuit at the request of William Foley, Director of the Administrative Office of the United States Courts acting upon the direc-

tion of the Judicial Conference of the United States, and rests upon the erroneous assumption that district courts retained exercisable original jurisdiction after *Marathon* and that, in the exercise of their own rulemaking powers, district courts can, by local rule, authorize bankruptcy judges to adjudicate bankruptcy cases and proceedings.[5]

The Rule violates 28 U. S. C. § 2071, Rule 83 of the Federal Rules of Civil Procedure and Rule 927 of the Federal Rules of Bankruptcy Procedure, all of which prohibit the implementation of any local rule which is inconsistent with the rules of practice and procedure prescribed by this Court. On its face, the Rule conflicts with the following rules prescribed by this Court: (1) Bankruptcy Rules 752 and 810 which, contrary to the Rule, require the district court to accept the factual findings of the bankruptcy court unless "clearly erroneous;" (2) Bankruptcy Rule 921 which, contrary to the Rule, provides that a judgment entered by a bankruptcy judge is effective upon entry (no submission to a district judge for review is required); (3) Bankruptcy Rules 115(b) and 409(c) which, contrary to the Rule, permit either party to demand a jury trial on any issue triable of right by a jury; and (4) Part VIII of the Bankruptcy Rules which provide procedures for appeals to the District Court, all of which are disposed of by the Rule in "related proceedings."

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[5]The memorandum accompanying the model rule identified 11 U. S. C. § 105 as the source of rule making authority drawn upon to support the delegation of authority to the bankruptcy courts. That statute, however, is an unlikely source of district court rulemaking power since its intent appears to be to confer power on the new Bankruptcy Courts equivalent to that already held by District Courts under 28 U. S. C. § 1651 (the "all writs statute"). See Vihon, *Delegation of Authority and the Model Rule: The Continuing Saga of Northern Pipeline*, 88 Comm. L. J. 64, 69 (Feb. 1983).

The Rule renders inoperable many existing statutes not affected by *Marathon*. For example, the Rule makes the reference of bankruptcy cases to the bankruptcy judges discretionary while § 405(a) provides for a *mandatory* reference of bankruptcy cases to bankruptcy judges. The Rule eliminates the operation of 28 U. S. C. § 1293(b) and 28 U. S. C. § 1482 which, respectively, permit direct appeals from the bankruptcy court to the circuit court or to bankruptcy panels designated under § 160(a) of Title 28. The Rule further attempts to create an estoppel against litigants who fail to object to the Bankruptcy Court's delegated jurisdiction by providing that a party must raise the jurisdictional question of the bankruptcy judge's authority to enter a final order "prior to the time of entry of the order or judgment of the district court after review."

More importantly, if after *Marathon* district courts are vested with exercisable original jurisdiction under the unamended version of 28 U. S. C. § 1334, as the Circuit Court has found, the Rule impermissibly *expands* that jurisdiction (which is limited to "matters and proceedings *in* bankruptcy") by purporting to give district courts control of "related proceedings" such as this one which are beyond the scope of § 1334. See Order of Feb. 10, 1983, App. B; Local Rule 51, Part III, App. J; and *United States v. Sherwood*, 312 U. S. 584, 589-590, 61 S. Ct. 767, 85 L. ed. 1058 (1941). Further, the Rule purports to grant blanket authority to bankruptcy judges to enter valid binding judgments in particular types of proceedings, (non-"related proceedings"), thereby attempting to make the very severance of bankruptcy court jurisdiction, which this Court said was impermissible in *Marathon*.

The Eighth Circuit has erroneously sanctioned this departure from accepted judicial rulemaking powers and has approved the District Court's wrongful attempt to exercise and to delegate original jurisdiction of this case to the Bankruptcy Court. To support its holding, the Eighth Circuit has relied upon decisions of other circuit and district courts which reach similar conclusions. Those conclusions, however, are the product of similar misconceptions of the meaning of *Marathon* and have resulted from much dispute and disagreement between the lower courts with numerous bankruptcy courts holding that neither they nor the district courts have any jurisdiction after *Marathon*[6], and with district courts[7] and circuit

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[6]*In re Dorothy J. Williamson,* 10 B. C. D. 298 (Bk. Ct. M. D. Ga. March 14, 1983); *In re Otero Mills, Inc.: Otero Mills, Inc. v. Security Bank & Trust,* 10 B. C. D. 89 (Bk. Ct. D. New Mex. Feb. 18, 1983); *In re Kent D. Richardson and F. Nadine Richardson,* Bk. No. 82C-00736, Civ. No. 82PC-0746 (Bk. Ct. D. Utah Feb. 7, 1983) rev'd 10 B. C. D. 182 (D. Utah Feb. 22, 1983); *In re Color Craft Press, Ltd.,* 10 B. C. D. 53, 27 B. R. 392 (Bk. Ct. D. Utah Feb. 7, 1983) rev'd 10 B. C. D. 182 (D. Utah Feb. 22, 1983); *In re Jorges Carpet Mills, Inc.: Still v. First Bank of Newton, Kansas,* 10 B. C. D. 1, 27 B. R. 333 (Bk. Ct. E. D. Tenn. Jan. 31, 1983); *In re Matlock Trailer Corp.: Walter E. Heller & Co. Southeast, Inc. v. Matlock Trailer Corp.,* Bk. No. 382-02778, Adv. No. 382-0755 (Bk. Ct. M. D. Tenn., Jan. 26, 1983) rev'd Gen. Dkt. No. 3:83-X-5 (M. D. Tenn. Feb. 23, 1983); *In re James C. Conley and Laura Conley,* 10 B. C. D. 10, 26 B. R. 885 (Bk. Ct. M. D. Tenn. Jan. 26, 1983); *In re Schear Realty & Investment Co., Inc.: Winters National Bank & Trust Co. of Dayton v. Shear Group,* 9 B. C. D. 1210, 25 B. R. 463 (Bk. Ct. S. D. Ohio, Western Div. Jan. 4, 1983); *In re Motion to Dismiss: Constitutionality of Jurisdiction of the Bankruptcy Court,* 23 B. R. 334 (Bk. Ct. N. D. Ga. Aug. 30, 1982). And see *In re Herrera: Ralph A. Herrera v. Weaver Construction Company, et al,* 10 B. C. D. 123 (Bk. Ct. D. Col. Feb. 2, 1983) [holding that district court jurisdiction exists, but that the emergency rule is invalid].

[7]*In re Q1 Corporation v. Victor Reichenstein,* Cv. No. 83-0525 (E. D. N. Y. March 22, 1983); *In re Matlock Trailer Corp.,*

(Continued on next page)

courts[8] taking the opposite position, often for dissimilar reasons, leaving both litigants and the courts in a state of confusion.[9]

We respectfully submit that the Court should grant this Petition and, in the exercise of its supervisory powers over the lower courts, the Court should rule that after *Marathon* the bankruptcy courts and district courts have no authority, either by statute or by rule, to continue ad-

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(Continued from previous page)

Walter E. Heller & Company Southeast, Inc. v. Matlock Trailer Corp., Gen. Dkt. No. 3:83-X-5 (M. D. Tenn. Feb. 23, 1983); *In re Color Craft Press, Ltd.: Color Craft Press, Ltd. v. Nationwide Shopper Systems, Inc.* and *In re Kent D. Richardson and F. Nadine Richardson: Gillman, et al v. Preston Family Invest. Co., et al*, 10 B. C. D. 182 (D. Utah Feb. 22, 1983) rev'ing 10 B. C. D. 53 and Bk. No. 82C-0736, supra; *In re Braniff Airways, Inc.: Braniff Airways Inc. v. Civil Aeronautics Bd.*, Misc. No. 4-221-E (N. D. Tex. 1983); *In re Northland Point Partners*, 26 B. R. 860 (E. D. Mich. Jan. 7, 1983), order adhered to 26 B. R. 1019 (E. D. Mich. Feb. 8, 1983) [certified to 6th Circuit under 28 U. S. C. § 1292(b) by Order entered Feb. 8, 1983].

[8]*White Motor Corporation v. Citibank, N. A.*, 51 U. S. L. W. 2594 (6th Cir. April 1, 1983); *In re Braniff Airways: Braniff Airways, Inc. v. Civil Aeronautics Board*, 700 F. 2d 214 (5th Cir. Feb. 28, 1983); and *In re Orville E. Hansen, First National Bank of Tekamah, Nebraska v. Orville E. Hansen and Virginia Hansen*, 10 B. C. D. 280 (8th Cir. March 23, 1983).

[9]Some Bankruptcy judges have expressed fear of personal liability for continuing to act under the new rule, *In re Schear Realty & Investment Co.*, supra, 9 B. C. D. at 1215-1216 and Chatz and Tatelbaum, *Conference Report: Bankruptcy Courts and the Emergency Rule*, Comm. L. J. 61, 62 (Feb. 1983)(remarks of Bankruptcy Judge Paskay at special conference called by Senator DiConcini, Jan. 7, 1983); others have refused to act at all and have been subjected to mandamus by the district court, *Gerald W. Moody, et al, debtors v. Hon. Robert D. Martin and Kayser Leasing Corp.*, No. 83-C-174-C (D. Wisc. March 7, 1983); at least one has resigned, Morris, *Courts In Confusion*, The Wall St. Journal (midwest ed.), Dec. 24, 1982 at 1, Col. 6, 13, Col. 4.

judicating title 11 cases or civil proceedings arising in or related to title 11 cases, including this adversary proceeding.

CONCLUSION

On the basis of the foregoing, a Writ of Certiorari should be issued to review the Judgment and Opinion of the Eighth Circuit and, upon review, this Court is requested to reverse that decision and order the dismissal of this case.

Respectfully submitted,

FIRST NATIONAL BANK OF TEKAMAH, NEBRASKA

By: MAUREEN E. MCGRATH
KUTAK ROCK & HUIE

The Omaha Building
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(402) 346-6000

Attorneys for Petitioner

Dated May 3, 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1158

IN THE MATTER OF:

ORVILLE E. HANSEN,

Debtor.

THE FIRST NATIONAL BANK
OF TEKAMAH, NEBRASKA,

Appellant,

vs.

ORVILLE E. HANSEN and
VIRGINIA HANSEN,

Appellees.

Appeal from the United States District Court
for the District of Nebraska

Submitted: March 14, 1983
Filed: March 23, 1983

Before HEANEY, BRIGHT and ROSS, Circuit Judges.

PER CURIAM.

In October 1981 appellee Orville Hansen filed this Chapter 11 bankruptcy proceeding. In November 1981 appellant First National Bank of Tekamah filed a petition in bankruptcy court seeking adjudication of its rights as a secured creditor of Hansen. The bankruptcy court, in

July 1982, dismissed the complaint and entered judgment for Hansen.

The bank appealed the judgment to the district court[1] pursuant to 28 U. S. C. § 1334. On December 21, 1982, the district court affirmed the bankruptcy court's ruling in part and remanded to the bankruptcy court for additional factual findings. On December 23, 1982, the district court of Nebraska adopted Local Rule 51 to allow the continued operation of the bankruptcy courts in light of *Northern Pipeline Const. v. Marathon Pipe Line Co.,* 102 S. Ct. 2858 (1982).

On February 10, 1983, the district court denied the bank's motion for reconsideration. The district court pursuant to Local Rule 51 remanded the case to itself for a de novo trial on the remaining factual issue and referred the case to the bankruptcy court for its recommendation. The bank appealed the orders of December 21, 1982, and February 10, 1983, and Hansen moved to dismiss this appeal for lack of a final appealable order. We stayed the implementation of the judgment of the district court pending appeal.

We agree with appellee that this appeal must be dismissed as interlocutory. This court has held that district court orders of remand are not final appealable orders. *see, e.g., Giordano v. Roudenbush,* 565 F. 2d 1015 (8th Cir. 1977); *Transportation-Com. Div. v. St. Louis-San Francisco Ry. Co.,* 419 F. 2d 933 (8th Cir. 1969).

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[1]The Honorable C. Arlen Beam, United States District Judge for the District of Nebraska.

Appellant argues the appeal is not interlocutory because the district court lacked jurisdiction over the case after December 24, 1982. We reject appellant's argument and conclude that *Marathon* did not invalidate 28 U. S. C. § 1471(a) and (b) and even if it did, the jurisdictional grant, 28 U. S. C. § 1334, remains effective during the post-*Marathon* transitional period. Further, we find that Local Rule 51 is constitutional and valid. *In re: Braniff Airways, Inc.,* Misc. 4-221-E (N. D. Tex. January 20, 1983), *aff'd In the Matter of: Braniff Airways, Inc.,* No. 83-1048 (5th Cir. February 28, 1983); *In re Color Craft Press Ltd.,* No. C83-0140J (D. Utah February 22, 1983); *In the Matter of Northland Point Partners,* No. 82-05387-W (E. D. Mich. January 7, 1983). *See also In re Keene Corp.,* No. 82-1242, 51 U. S. L. W. 3601, 3613 and 3616 (S. Ct. February 22, 1983) (mandamus denied). Therefore, we hold that the district court had jurisdiction and its order of remand to itself for further findings was proper and in accordance with Local Rule 51.

Accordingly, the appeal is dismissed and the stay is dissolved unless extended by the district court.

a true copy.

Attest:

CLERK, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BK 81-1992
Adv. No. A81-808

IN THE MATTER OF:

ORVILLE E. HANSEN,

Debtor.

THE FIRST NATIONAL BANK OF
TEKAMAH, NEBRASKA,

Plaintiff,

vs.

ORVILLE E. HANSEN and
VIRGINIA HANSEN,

Defendants.

CV 82-0-412

CV 82-0-464

CV 82-0-515

ORDER

Filed February 10, 1983

This matter is before the Court after receipt of briefs in support of and in opposition to appellant's motion for rehearing and vacation of judgment and appellees' motion for reconsideration.

This case was reviewed on appeal from the United States Bankruptcy Court for the District of Nebraska, resulting in this Court's Memorandum and Order of December 21, 1982. All legal and factual issues except one

were affirmed on appeal, with one factual issue to be remanded for trial de novo by a court of competent jurisdiction.

At the time of this Court's judgment, the Bankruptcy Court had jurisdiction to entertain this case on remand and to take evidence and decide the remaining factual issue. As of December 25, 1982, however, the Bankruptcy Court lost original jurisdiction of "related proceedings," i.e., cases such as this one which "in the absence of a petition in bankruptcy, could have been brought in a district court or a state court." *Local Rule* 51; *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982). As a result, appellant urges that the remaining issue to be tried in this action cannot be "remanded" to the Bankruptcy Court for de novo determination, apparently because the only forum in the federal judicial system with original jurisdiction of such a "related proceeding" would be a federal district court.

If, as the Bank contends, the issue remaining to be tried cannot be "remanded" to the Bankruptcy Court, then it can be remanded by this Court, acting in its appellate capacity, to the United States District Court for the District of Nebraska as a court of original jurisdiction over "related proceedings." If so remanded, the issue to be tried can and will then be "referred" under *Local Rule* 51 to the Bankruptcy Court for "findings, conclusions and a proposed judgment or order to the district judge," after the hearing of additional evidence. *Id.* Once remanded to the District Court, this case will no longer be in the posture of an "appeal" within the meaning of 28 U. S. C. § 1334(c) (in effect during the transition period), and can therefore be referred without conflicting with section 1334(c).

IT IS THEREFORE ORDERED that the order of December 21, 1982, issued by this Court in its appellate capacity, is modified as follows:

> These actions are hereby remanded to the United States District Court for the District of Nebraska for trial de novo of the sole factual issue remaining in this case, i.e., whether Virginia Hansen authorized and/or ratified Orville Hansen's pledge of her interest in their common property to the First National Bank of Tekamah, and if so, to what extent and with respect to which property did she authorize or ratify such pledge.

IT IS FURTHER ORDERED that to this extent appellant's motion is granted in part and is otherwise denied, and appellees' motion is denied.

IT IS FURTHER ORDERED that, acting in the capacity of a district court with original jurisdiction of "related proceedings" within the meaning of *Local Rule* 51, this Court hereby accepts jurisdiction and simultaneously refers the trial of said issue to the United States Bankruptcy Court for the District of Nebraska for proceedings in accordance with this order, the Memorandum and Order of December 21, 1982, and *Local Rule* 51.

DATED this 10th day of February, 1983.

BY THE COURT:

/s/ C. Arlen Beam
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BK 81-1992
Adv. No. A81-808

IN THE MATTER OF:

ORVILLE E. HANSEN,

Debtor.

THE FIRST NATIONAL BANK OF
TEKAMAH, NEBRASKA,

Plaintiff,

vs.

ORVILLE E. HANSEN and
VIRGINIA HANSEN,

Defendants.

CV 82-0-412
CV 82-0-464
CV 82-0-515

ORDER

Filed December 21, 1982

IT IS ORDERED that:

1. These actions are hereby remanded to the United States Bankruptcy Court for the District of Nebraska for further proceedings in accordance with the Memorandum Opinion issued contemporaneously herewith.

2. In all other respects the Judgment of the Bankruptcy Court is affirmed.

3. The temporary stay pending appeal issued by this Court on September 7, 1982, and continued on September

16, 1982, is hereby dissolved, and the appellant may apply to the Bankruptcy Court for such further relief as may be necessary in that regard.

DATED this 21st day of December, 1982.

BY THE COURT:

/s/ C. Arlen Beam
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BK 81-1992
Adv. No. A81-808

IN THE MATTER OF:

ORVILLE E. HANSEN,

Debtor.

THE FIRST NATIONAL BANK OF
TEKAMAH, NEBRASKA,

Plaintiff,

vs.

ORVILLE E. HANSEN and
VIRGINIA HANSEN,

Defendants.

CV 82-0-412
CV 82-0-464
CV 82-0-515

MEMORANDUM OPINION

Filed December 21, 1982

These related cases are before the Court on appeal from the Bankruptcy Court's Judgment of July 22, 1982, and subsequent Order of September 3, 1982. As further set forth below, the Court affirms the Judgment of the Bankruptcy Court as to all issues raised on appeal with one exception, and as to that issue the Court remands this action for further proceedings in accordance with this Memorandum Opinion.

The First National Bank of Tekamah, Nebraska, is the primary creditor of Orville E. Hansen, the debtor in a Chapter 11 reorganization proceeding filed in the United States Bankruptcy Court for the District of Nebraska. Virginia Hansen, the debtor's wife, is not a party to the bankruptcy action. The Bank sought a determination that Mr. Hansen is the sole owner of certain farm property which consists of most of the assets accumulated by the Hansens during their 32 years of marriage, and that all of the property is subject to the Bank's security interest. After a trial on the merits, the Bankruptcy Court found as follows. Virginia Hansen owns one-half of the property in question free and clear of the Bank's lien. The Bank failed to prove its allegations of partnership, misrepresentation, estoppel, unjust enrichment, conversion, right to contribution and agency. Orville Hansen's debt is dischargeable, and the Bank does not have a perfected security interest in the Hansens' growing crops or the proceeds thereof.

Matters on appeal to this Court after trial on the merits in the Bankruptcy Court are subject to the clearly erroneous standard of review. Therefore, unless this Court is left with the definite and firm conviction that a mistake

has been committed, the findings of fact by the Bankruptcy Court are to be affirmed. *Acacia Mutual Life Ins. Co. v. Perimeter Park Investment Assoc., Ltd.*, 616 F. 2d 150, 151 (5th Cir. 1980) (*Bankruptcy Rule* 810); *Lang v. Cone*, 542 F. 2d 751, 754 (8th Cir. 1976) (appeal from Fed. R. Civ. P. 41(b) dismissal).

The Bank first urges that either Orville Hansen owns all of the property on the Hansen farm and his wife owns none, or, in the alternative, that the Hansens were engaged in a secret business partnership. The primary basis for this view is Orville Hansen's practice of using his name alone in dealings with creditors, suppliers and others, without reference to his wife's interest in the farm property.

On the other hand, both of the Hansens testified befor the Bankruptcy Court that any property they acquired was regarded by them as jointly owned and that neither had ever considered Orville Hansen the exclusive owner of the farm assets. In addition, their expression of intent to hold all property concurrently has been consistent with their treatment of titled assets. Their only bank account is a joint checking account at appellee Bank into which their farm income was deposited, and Virginia, who undertook the farm bookkeeping duties, wrote many of the checks on this account. The Hansens are parties to a land contract to purchase their farm in joint tenancy, the deed to which is held in escrow at appellee Bank. The contract, deed and escrow instructions bear the names of both Orville and Virginia Hansen. Their vehicles also are titled in joint tenancy. Insurance policies on the property in question name both Orville and Virginia. The sign in front of their farm reads "The Hansens, Orville and Vir-

ginia." They both exercised open and continuous possession and control of the farm and everything on it.

The record reveals no evidence that either of the Hansens brought any goods or capital into their marriage, and for 32 years they worked together in their various farming endeavors. Although Virginia apparently assumed most of the housekeeping and child care responsibilities, she also performed duties more specifically related to farming. The record clearly indicates that all of the property accumulated by the Hansens over a 32 year period derives from their joint efforts in their farming operations. *See Craig v. United States*, 451 F. Supp. 378 (D. S. D. 1978).

Appellee relies on several Nebraska cases which hold that in the absence of an express contract a husband is not required to compensate his wife for work performed beyond her "ordinary household duties" in connection with property or business interests to which he alone holds title. *See, e. g., Peterson v. Massey,* 155 Neb. 829, 53 N. W. 2d 912 (1952). In the present action, however, both spouses hold legal title to all titled property; both agree that all of their assets are jointly owned, and compensation for services is not the issue. Cotenancy is the issue. Applying the principle that the form of ownership in which property is taken depends to a substantial extent on the intent of the parties, *see generally In re Whiteside's Estate,* 159 Neb. 362, 368, 67 N. W. 2d 141, 145 (1954), the Bankruptcy Court found that Orville and Virginia Hansen own the farm property in cotenancy, each owning a one-half undivided interest. This finding is not clearly erroneous and is sufficiently supported by the record.

With respect to the contention that the Hansens were parties to a secret business partnership, the Bankruptcy Court found that the record contains no evidence of any such partnership agreement. Furthermore, as a general rule "joint tenants and tenants in common are not partners and thus have no implied authority to bind each other. Thus a third party who takes a mortgage from one of the cotenants or makes improvements at the request of one of the cotenants may find himself out of luck in attempting to proceed against another cotenant's interest." Volkmer, Nebraska Law of Concurrent Ownership, 13 *Creighton L. Rev.* 513, 529 (1979).

In *Ogallala Fertilizer Co. v. Salsbery,* 186 Neb. 537, 184 N. W. 2d 729 (1971), the Nebraska Supreme Court declined to impute a business partnership relation to a married couple who shared a joint checking account into which their farm income was deposited, so that in a sense they shared profits and losses from the farm enterprise, not unlike business partners. Yet this, being quite a usual marital arrangement, standing alone, is insufficient to establish a partnership. . . ." *Id.* at 538, 184 N. W. 2d at 730. Moreover, the creditor who had dealt exclusively with the husband could not recover his claim from the wife in the absence of proof that the husband had contracted with the creditor in the capacity of a managing partner in whose name all partners transacted business with third parties. The Bankruptcy Court in the present action was not clearly erroneous in concluding on the basis of the evidence before him that, as in the *Ogallala Fertilizer* case, Mr. Hansen contracted with appellee in his individual capacity rather than as the managing partner of a business partnership.

With respect to the claims of estoppel and fraud, the Bankruptcy Court found that Virginia Hansen at no time made any misrepresentations to the Bank, nor did she act improperly in any manner. The record suggests that the Bank's surprise at the discovery of Virginia Hansen's interest in the farm property derives primarily from its remarkably casual banking practices, including an avowed policy of ignoring the existence of farm wives in extending agricultural loans to their husbands. The loan officer who has managed Orville Hansen's account since 1976 testified that for at least 10 years the Bank has operated on the assumption that farm wives do not own farm property. The Bank's reasoning in Orville Hansen's case was circular, i. e., because Orville was the person with whom the Bank dealt, it seems never to have occurred to the loan officers involved that Virginia Hansen might have her own interest in the property. As a result, no Bank official ever inquired of either Orville or Virginia whether either or both of them considered Virginia a co-owner of the farm property.

Notwithstanding the Bank's knowledge of the Hansens' joint checking account and the status of their real estate purchase in joint tenancy, the Bank has taken the position that it was entitled to assume that all remaining property belonged exclusively to Orville Hansen. The Bank made no inquiries and did not even conduct lien or title searches with respect to the farm vehicles, which would have revealed joint ownership of those assets by the Hansens. Bank officials never requested Virginia to sign loan documents, financing statements, guarantees or promissory notes. They never requested her presence at

loan negotiations, and she never participated in any dealings with the Bank. *See contra, Clements v. Doak,* 140 Neb. 265, 266, 299 N. W. 505, 507 (1941).

The annual property statements on which the Bank now claims reliance were prepared in a most informal manner. At the periodic request of his loan officer, Orville Hansen would bring in a list of all of the property on the farm and his estimate of its current value. Mr. Hansen would then sign a property statement in blank, and later the loan officer would complete it after minimal discussion, if any, concerning the cattle count or whether property previously listed had appreciated or declined in value. Periodically the loan officer would drive by the Hansen farm or visit to inspect the livestock. Despite the Bank's awareness of the Hansens' joint tenancy in their checking account and realty, the entire value of both cash on hand (checking account) and the realty appeared on the property statements in the loan officer's handwriting. In addition, no real estate appraisals were ever conducted by the Bank.

In the absence of any statements by Virginia Hansen it is difficult to see how she could have misrepresented her ownership interests or how the Bank could have relied on her representations so as to give rise to a basis for estoppel. If a cotenant "does nothing to mislead a third person, or where the conduct of the tenant is not such as to warrant a third person's reliance thereon, the tenant is not estopped to assert that he is not bound by the unauthorized acts of his cotenant." *First Nat. Bank in Ord v. Morgan,* 172 Neb. 849, 854, 112 N. W. 2d 26, 30 (1961).

As to whether an equitable lien should attach to Mrs. Hansen's share of the farm property on the theory of unjust enrichment, Comment 5 to *Neb. Rev. Stat.* § 9-203 (Reissue 1980) (attachment and formal requirements for enforceability of security interests) states:

> The theory of equitable mortgage, insofar as it has operated to allow creditors to enforce informal security agreements against debtors, may well have developed as a necessary escape from the elaborate requirements of execution, acknowledgement and the like which the nineteenth century chattel mortgage acts vainly relied on as a deterrent to fraud. Since this Article reduces formal requisites to a minimum, the doctrine is no longer necessary or useful. More harm than good would result from allowing creditors to establish a secured status by parol evidence after they have neglected the simple formality of obtaining a signed writing.

The record does not establish that Orville Hansen conveyed any of the Bank's collateral to his wife. The Hansens purchased their property jointly using joint funds, some of which derived from the loans Orville obtained from appellee and others of which were traceable to Virginia's hard work on the farm, as well as Orville's. To use the theory of unjust enrichment to impress an equitable lien on her share of their joint property would circumvent the simple requirement that a secured lender obtain a signed writing pursuant to section 9-203, *supra*. As stated herein, no fraud, misrepresentation or other improper behavior was established at trial.

Having failed to protect its own interests, such as by requiring that Virginia Hansen sign a security agreement and note, the Bank now claims that Mrs. Hansen con-

verted the proceeds of the loans extended to her husband. The loan funds were deposited in the Hansens' joint bank account, as were the profits from the farming operation. The contents of this account were not subject to the Bank's lien, and Virginia was entitled to draw on the account for any purpose including purchases. As the funds were used to make joint purchases, the Bank's security interest attached to Orville Hansen's share of property acquired thereby to the extent that such goods qualified as after-acquired property under the description of collateral in his security agreement with the Bank. *See Neb. Rev. Stat.* § 9-203, *supra*. There is no showing in the record that the funds were used for purposes other than the payments and purchases for which the loans were extended. The Bankruptcy Court was not clearly erroneous in rejecting the Bank's claim of conversion.

Orville Hansen never purported to grant a mortgage in the farm real estate to the Bank. Moreover, the Bank knew that the land was in the process of purchase by the Hansens as joint tenants. Therefore, it is less than clear to this Court why the entire value of the real estate owned by the Hansens, or in fact any of it, should be considered subject to the Bank's security interest. Furthermore, this issue does not appear to have been raised before the Bankruptcy Court. For these reasons, this claim must fail on appeal.

A related claim concerns whether Orville Hansen has a right of contribution against his wife for funds he may have used to pay her portion of the land contract payments. The record does not establish whether or to what extent the source of such payments consisted of Orville Hansen's separate loan funds as opposed to the Hansens'

joint profits from their farming operations. As the record reveals inadequate proof that Orville Hansen in fact paid "more than his share" of their joint obligation, the Bankruptcy Court did not err in refusing to find that such a right of contribution exists in this case. Furthermore, under Nebraska law, even if one spouse contributes more than his share of the purchase price of property acquired in the name of the other or jointly, a presumption arises that a gift was intended as to the amount contributed in excess of the payor spouse's half. *Hoover v. Haller,* 146 Neb. 697, 705, 21 N. W. 2d 450, 455 (1946).

The issue which troubles this Court and which requires a remand for further findings and perhaps further evidence involves the Bank's assertion that Virginia Hansen authorized her husband to pledge her property.

It is clear that no agency relation is presumed to exist by virtue of cotenancy and that "one cotenant cannot ordinarily bind his fellows by contracts with third persons, unless he is . . . duly authorized or unless they thereafter ratify his act." 20 AM. JUR. 2d *Cotenancy and Joint Ownership* §§ 2, 91, 102 (1965). *Accord, Aherens v. Dye,* 206 Neb. 423, 425, 293 N. W. 2d 388, 390 (1980). Furthermore, in the absence of such authorization or ratification, a co-owner of property can convey or mortgage only such interest as he has, and the sale or lien will not affect the interests of the other co-owners. *Jolliffe v. Maxwell,* 3 Neb. Unoff. 244, 91 N. W. 563, 565-66 (1902).

The record establishes Virginia Hansen's knowledge that her husband had pledged farm property to the Bank as security for his loans, and that on certain occasions, at least, he was pledging all of their cattle. Even counsel

for Orville Hansen conceded in his opening statement to the Bankruptcy Court that Virginia knew or assumed Orville had granted the Bank a security interest in all of the cattle and feed on the farm. In advance of certain loan applications, the Hansens apparently discussed Orville's intention to visit the Bank to borrow funds and to pledge certain property. As to other occasions, the record is not clear whether Virginia knew the extent of her husband's borrowings and the character or amount of property pledged. Whether their discussions and Virginia's knowledge of and cooperation in Orville's efforts to borrow funds from the Bank amount to prior authorization for her husband to pledge her property and/or ratification of such pledge cannot be reviewed on this record.

The Bankruptcy Court made no findings as to whether Virginia Hansen authorized the pledge of her property by her husband or whether she subsequently ratified such pledge, and, if so, the extent to which her property is therefore encumbered. As to these issues, the Bankruptcy Court concluded only that Virginia Hansen had not signed a note or security agreement and that Orville Hansen had not formed an intent to convey an interest in his wife's property. Specifically, the Court stated:

> I conclude as law that Mrs. Hansen's interest is free and clear of First National Bank's security interest in that she did not sign any note to the bank to evidence the indebtedness, that the loans were made to Mr. Hansen and that there is no security agreement in existence which bears Mrs. Hansen's signature. I make that finding in view—notwithstanding the suggestion that there was some implied authority. I do not believe that Mr. Hansen acted with the intent to convey the interest or give a security agreement in-

volving Mrs. Hansen's interest simply because he did not think in terms of those legal concepts. The bank, as I have said, failed to inquire.

The latter of these findings, i. e., that Orville Hansen did not intend to convey a security interest in the half of the farm property owned by Virginia, is contradicted by the evidence. Mr. Hansen did not even testify to this effect. On the contrary, the record contains multiple admissions that he intended to pledge all of certain kinds of property on the farm, e. g. cattle, in which he was a coowner, and his actions were consistent with such intent. While Mr. Hansen may not have maintained an intent to deceive the Bank, and the evidence suggests that he did not, nevertheless he purported to convey a security interest in any and all farm property in which the Bank required an interest as a prerequisite to granting him the loans. As the Bankruptcy Court concluded, Mr. Hansen probably did not think in terms of the legal consequences flowing from his coownership of the farm property with his wife. One such consequence is that he could effectively pledge only his own undivided interest in the common property in the absence of Virginia's authorization or ratification of such pledge as to her share of the property. *See* 20 AM. JUR. 2d, *Cotency and Joint Ownership* § 102 (1965). However, as the record strongly suggests that Orville Hansen intended to pledge *all* property available to him to secure his loans from the Bank, it is necessary to determine de novo whether Mrs. Hansen made her share of the property available to him for this purpose. Such a determination is properly remanded to the Bankruptcy Judge, who has had the opportunity to see and judge the credibility of the witnesses

involved and who can take such further evidence, if any, as may be necessary to make this determination. This action will therefore be remanded to the Bankruptcy Court for specific findings on the issue of Virginia Hansen's actual, not implied, authorization and/or ratification of her husband's pledge of her share in their common property. If the Bankruptcy Court concludes that Mrs. Hansen did authorize her husband to pledge property of which she is co-owner, the nature and extent of the property so encumbered must be determined, e. g., cattle only, cattle and feed, or all concurrently-owned farm assets.

On the issue of dischargeability, the Bankruptcy Court's finding that appellee failed to establish the essential element of intent to deceive is not clearly erroneous and is therefore affirmed.

In 1965, Orville Hansen executed a security agreement which granted the Bank a security interest in crops on a farm then leased by the Hansens. The legal description of that farm was included in the agreement. Under the Nebraska Uniform Commercial Code as it then existed and until July, 1980, no security interest could attach under an after-acquired property clause "to crops which become such more than one year after the security agreement [was] executed." Thus, the 1965 agreement expired as to Orville Hansen's share of growing crops "which became such" after 1966. Subsequently, the 1980 amendments to the Nebraska Uniform Commercial Code deleted the limitation as to after-acquired crops. Appellee contends that its security interest in crops then revived to cover the Hansens' 1981 corn crop. However, in the meantime, the Hansens had ceased farming on the

realty described in the 1965 security agreement and had for years engaged in farming in their present location. In 1967, Orville Hansen had executed another security agreement granting a security interest in crops and after-acquired property "on the Orville Hansen farm," but without a legal description. *See Neb. Rev. Stat.* § 9-203 (1) (a) (Reissue 1980). As a result, in 1981 there was no security agreement on file with a legal description of the real property location of the Hansens' 1981 corn crop. On the basis of these facts, the Bankruptcy Court held that the Bank was unsecured as to Orville Hansen's share of the 1981 corn crop and its proceeds. This finding is affirmed.

An order has been entered contemporaneously herewith in accordance with this Memorandum Opinion.

DATED this 21st day of December, 1982.

BY THE COURT:

/s/ C. Arlen Beam
United States District Judge

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

Case No. BK81-1992

A81-808

IN THE MATTER OF:

ORVILLE E. HANSEN,

Deptor,

THE FIRST NATIONAL BANK
OF TEKAMAH, NEBRASKA,

Plaintiff,

vs.

ORVILLE E. HANSEN and
VIRGINIA HANSEN,

Defendants.

JUDGMENT

In accordance with the findings of fact and conclusions of law made in Court and on the record, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. First National Bank of Tekamah, Nebraska, plaintiff, has a valid security interest in the undivided one-half interest of Orville E. Hansen in the equipment, livestock, contract rights, accounts and proceeds owned by the said Orville E. Hansen, defendant, on the date of the filing of this petition for relief and no valid security interest in any other assets of the defendants, Orville E. Hansen and Virginia Hansen;

2. That the Court finds generally in favor of the defendants and against the plaintiff on the plaintiff's second cause of action in its amended complaint;

3. That the Court finds generally in favor of the defendant, Orville E. Hansen, and against the plaintiff on the third cause of action in the plaintiff's amended complaint;

4. That the Court finds generally in favor of the defendants and against the plaintiff on the fourth cause of action of plaintiff's amended complaint;

5. That the Court finds generally in favor of the defendants and against the plaintiff on the fifth cause of action of plaintiff's amended complaint;

6. That the Court finds generally in favor of the defendant, Virginia Hansen, and against the plaintiff on the sixth cause of action of plaintiff's amended complaint.

DATED: July 22, 1982.

BY THE COURT:

/s/ David L. Crawford
U. S. Bankruptcy Judge

Copies to:

Michael Helms, Attorney, 1800 First Nat'l. Center, Omaha, Ne. 68102

Maureen McGrath, The Omaha Building, 1650 Farnam Street, Omaha, Ne. 68102

APPENDIX E

P. L. 95-598, § 241 (a) [28 U. S. C. § 1471]

Sec. 241 (a) Title 28 of the United States Code is amended by inserting immediately after chapter 89 the following:

* * *

§ 1471. Jurisdiction

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

APPENDIX F

28 U. S. C. § 1334. Bankruptcy matters and proceedings.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy. June 25, 1948, c. 646, 62 Stat. 931.

APPENDIX G

P. L. 95-598, § 238

Sec. 238. (a) Section 1334 of title 28 of the United States Code is amended to read as follows:

"§1334. Bankruptcy appeals

"(a) The district courts for districts for which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

"(b) The district courts for such districts shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken.

"(c) A district court may not refer an appeal under that section to a magistrate or to a special master.".

(b) The table of sections of chapter 85 of title 28 of the United States Code is amended by striking out the item relating to section 1334 and inserting in lieu thereof the following:

"1334. Bankruptcy appeals."

APPENDIX H

P. L. 95-598, § 402

§ 402. (a) Except as otherwise provided in this title, this Act shall take effect on October 1, 1979.

(b) Except as provided in subsections (c) and (d) of this section, the amendments made by title 2 of this Act shall take effect on April 1, 1984.

(c) The amendments made by sections 210, 214, 219, 220, 222, 224, 225, 228, 229, 235, 244, 245, 246, 349, and 251 of this Act shall take effect on October 1, 1979.

(d) The amendments made by sections 217, 218, 230, 247, 302, 314 (j), 317, 327, 328, 338, and 411 of this Act shall take effect on the date of enactment of this Act.

(e) The amendments made by sections 335(a) and 336(a) of this Act shall take effect on April 1, 1984.

APPENDIX I

P. L. 95-598, § 405

§ 405. (a)(1) All cases commenced under title 11 of the United States Code during the transition period shall be referred to the United States bankruptcy judges. The United States bankruptcy judges may exercise in such cases the jurisdiction and powers conferred by subsection (b) of this section on the courts of bankruptcy continued by section 404(a) of this Act, and all proceedings in such cases shall be before the United States bankruptcy judges, except—

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt—

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment; or

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge.

(2) Except as provided in subsection (c) of this section, any proceeding in a court of bankruptcy in a case under title 11 of the United States Code that is not before the United States bankruptcy judge shall be before the judge of the court of bankruptcy for the district in which such case is pending.

(b) During the transition period, the amendments made by sections 241, 243, 250, and 252 of this Act shall apply to the courts of bankruptcy continued by section 404(a) of this Act the same as such amendments apply to the United States bankruptcy courts established under section 201 of this Act.

(c)(1) During the transition period, an appeal from a judgment, order, or decree of a United States bankruptcy judge shall be—

(A) if the circuit council of the circuit in which the bankruptcy judge sits so orders for the district in which the bankruptcy judge sits, then to a panel of three bankruptcy judges appointed in the manner prescribed by section 160 of title 28 of the United States Code, as added by section 201 of this Act;

(B) if the parties to the appeal agree to a direct appeal to the court of appeals for such circuit, then to such court of appeals; or

(C) to the district court for the district in which the bankruptcy judge sits.

(2) During the transition period, the jurisdiction of the district courts, the courts of appeals, and panels of bankruptcy judges to hear appeals shall be the same as the jurisdiction of such courts and panels granted under the amendments made by sections 236, 237, 238, and 241 of this Act to hear appeals from the judgments, orders, and decrees of the bankruptcy courts established under section 201 of this Act.

(d) The rules prescribed under section 2075 of title 28 of the United States Code and in effect on September 30, 1979, shall apply to cases under title 11, to the extent not inconsistent with the amendments made by this Act, or with this Act, until such rules are repealed or superseded by rules prescribed and effective under such section, as amended by section 248 of this Act.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ORDER AMENDING LOCAL
RULES OF PRACTICE

Filed December 25, 1982

IT HEREBY IS ORDERED that effective December 25, 1982, the following shall be effective in this district:

RULE 51

ADMINISTRATION OF BANKRUPTCY COURT

The purpose of this rule is to supplement existing law and rules with respect to the authority of the bankruptcy

judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, — U. S. —, 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in § 241(a) of Public Law 95-598, (2) the clear intent of Congress to refer bankruptcy matters to the bankruptcy judges, (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the district courts' assuming the existing bankruptcy caseload on short notice.

THEREFORE, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

I.

Filing of Bankruptcy Papers

The bankruptcy court constituted by § 404 of Public Law 95-598 shall continue to be known as the United States Bankruptcy Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

II.

Reference to Bankruptcy Judges

All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of a reference shall not stay any bankruptcy matter pending before a bankruptcy judge, unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

III.

Powers of Bankruptcy Judges

1. The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings, except that the bankruptcy judges may not conduct:

A. A proceeding to enjoin a court;

B. A proceeding to punish a criminal contempt—

(1) not committed in the bankruptcy judge's actual presence, or

(2) warranting a punishment of imprisonment;

C. An appeal from a judgment, order, decree or decision of a United States bankruptcy judge; or

D. Jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

2. Except as provided in paragraph 3 of this section, orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

3. Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include but are not limited to claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings with respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings with respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who

have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

IV.

District Court Review

1. A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge shall be filed within ten days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or order. As modified by paragraphs numbered 2 and 3 of this section, the procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

2. A district judge shall review:

   A. An order or judgment entered under paragraph 2 of Section III of this rule, if a timely notice of appeal has been filed or if a time-

ly application for leave to appeal has been granted;

B. An order or judgment entered under paragraph 2 of Section III of this rule, if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

C. A proposed order or judgment lodged under paragraph 3 of Section III of this rule, whether or not any notice of appeal or application for leave to appeal has been filed.

3. In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject or modify, in whole or in part, the order or judgment of the bankruptcy judge, and the district judge need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

4. When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph numbered 2 of this section, the district judge shall review the matter and enter an order or judgment as soon as possible.

5. It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order or judgment of the district judge after review.

V.

Local Rules

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

VI.

Bankruptcy Rules and Title IV of Public Law 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankrutpcy rules prescribed by the Supreme Court of the United States pursuant to 28 U. S. C. § 2075 and limited by § 405 (d) of the Act, to the extent that such Title and Rules are not inconsistent with the holding of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, supra.

VII.

Effective Date and Pending Cases

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982, shall be deemed referred to that judge.

Dated December 24, 1982.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

/s/ Albert G. Schatz
District Judge

/s/ C. Arlen Beam
District Judge

APPENDIX K

11 U. S. C. § 105: Power of court

(a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

(b) Notwithstanding subsection (a) of this section, a bankruptcy court may not appoint a receiver in a case under this title.

Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2555.

APPENDIX L

28 U. S. C. § 2071: Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

APPENDIX M

Federal Rules of Civil Procedure

Rule 83. Rules by District Courts

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

APPENDIX N

Federal Rules of Bankruptcy Procedure

Rule 927. Local Bankruptcy Rules

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing practice and procedure under the Act not inconsistent with these rules. Copies of rules and amendments so made shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, for making copies of such rules available to members of the public who may request them. In all cases not provided for by rule, the district court may regulate its practice in any manner not inconsistent with these rules.

APPENDIX O

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.